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No. 80-2039

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS C. OSTRER and SEYMOUR GREENFIELD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that (a) statements contained in a short newspaper article read by certain jurors near the beginning of their trial were so prejudicial as to require the district court to empanel a new jury and (b) the district court's voir dire of the jurors exposed to the allegedly prejudicial article was inadequate under the standard established in *United States* v. *Persico*, 425 F.2d 1375 (2d Cir.), cert. denied, 400 U.S. 869 (1970).

1. Following a six-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to evade payment of $6.8 million of petitioner Ostrer's personal income taxes, in violation of 18 U.S.C. 371; petitioner Ostrer was also convicted of evasion of income taxes (26 U.S.C. 7201), conspiracy to embezzle and embezzlement (18 U.S.C. 371, 664), transportation of embezzled funds (18 U.S.C. 2314), and investing funds derived from a "pattern of racketeering" (18 U.S.C. 1962(a)). Petitioner Ostrer was sentenced to 20 years' imprisonment and a fine of $70,000, and the costs of prosecution were assessed against him; petitioner Greenfield was sentenced to three years' imprisonment and a fine of $10,000 (Pet. App. 2a).

Three days after the trial began, an article appeared in the New York Post entitled "The Man Who Owes $7 Million in Taxes." The article was essentially a summary of remarks made by the prosecutor and petitioner Ostrer in their opening statements.[1] It also referred to Ostrer as having "alleged links to the underworld" and to an attempt by the Manhattan District Attorney's Office "to force Ostrer to testify before a special grand jury about information he had about alleged organized crime, loansharking, extortion and murder" (see petitioners' C.A. Br. App.).

The article appeared on a Friday when the court was not sitting. On the following Monday, the court asked all of the jurors whether they had seen the article. After five jurors responded that they had seen the article (Tr. 158), they were questioned

[1] Ostrer represented himself, but at the court's direction one of his two retained lawyers was always present to advise him.

individually by the court.[2] Each of the jurors unequivocally stated that the article, or so much of it as he had read, would not influence his deliberations. The court then reminded each juror of his obligation to decide the case on the evidence introduced at trial, and each juror, without hesitation, acknowledged that he could do so (Tr. 159-164). The court also instructed the five jurors who had seen the article not to discuss it with any of the remaining jurors (Tr. 158-159).

At the completion of the voir dire, Ostrer moved for a mistrial and Greenfield moved for a severance. Neither of them, however, asked the court to inquire of the jurors any further; nor was there any request for further instructions.

2. The Second Circuit correctly concluded that petitioners were not prejudiced by the newspaper article and that the district court's voir dire was adequate. As the court of appeals noted (Pet. App. 3a), "[t]he newspaper article contained little that had not already been discussed in the courtroom and the district court's inquiry of the jurors who had read it was prompt and searching." In addition, petitioners obscure the fact that most of what was assertedly prejudicial in the newspaper article was "brought out at trial as competent evidence" (*United States* v. *Persico*, *supra*, 425 F.2d at 1380).

a. In his opening statement, Ostrer conceded his tax liability (Tr. 52-59). His primary defense to the evasion of payment counts was that he owed large sums of money to "loansharks" and was therefore unable to pay the taxes he owed. He explained to the

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[2] "Tr." references are to the trial transcript; "DX" refers to defense exhibits at trial.

jury that he would prove that he had to pay "thousands of dollars to private money lenders" (Tr. 50). Consistent with his opening statement, during his direct testimony Ostrer referred to those lenders, as had his attorneys in the pretrial proceedings, as "loansharks" and testified repeatedly that he owed large sums of money to "loansharks" and "shylocks" (Tr. 2128, 2132, 2186, 2190). Similarly, in his examination of other witnesses, Ostrer elicited, or attempted to elicit, testimony concerning his dealings with loansharks (Tr. 1132, 1168, 1693, 2683). Ostrer also testified that he had received beatings from a number of the loansharks to whom he owed money (Tr. 2188-2190).

Ostrer claimed to be heavily indebted to numerous attorneys who had unsuccessfully represented him in several criminal cases. At one point, he boasted that one of those convictions was for stock fraud "with a man * * * [named] Johnny Dio, an infamous character that had an unsavory background" (Tr. 2166-2167). Ostrer told the jury that he had gone to jail for three years as a result of that conviction and explained that he had used numerous lawyers fighting the conviction (Tr. 2175). Similarly, in an effort to explain why he had been riding in a chauffeur-driven limousine at a time when he claimed to be in difficult financial straits, Ostrer testified that such a luxury was necessary after he had been called as a grand jury witness by the New York County District Attorney and had been advised that he "was earmarked for mutilation by unsavory persons" (Tr. 2278-2279).

Ostrer unsuccessfully tried to introduce additional evidence of his ties to organized crime. For example, although not permitted to do so on relevancy and

hearsay grounds, Ostrer sought to introduce an Internal Revenue Service investigative report that showed that he was heavily indebted to organized crime families (Proposed DX 138; Tr. 2106-2107). Similarly, he sought to testify that he was considered for the FBI's "Top Echelon Criminal Informant Program" in 1967 (Tr. 2100).

b. Petitioners now claim (Pet. 6-7) that they were prejudiced by the brief references in the article to Ostrer's "alleged links to the underworld" and the Manhattan District Attorney's apparently unsuccessful effort to force Ostrer to give information about "alleged organized crime, loansharking, extortion and murder." In light of Ostrer's chosen defense strategy, that claim is on its face insubstantial. The prejudice is claimed to arise from the suggestion that Ostrer and, indirectly, Greenfield (see *id.* at 6 n.1) had "links to the underworld" or "organized crime" activity. This "suggestion," of course, had already been made by Ostrer in his opening statement and was emphasized by him during the course of the six-week trial. Thus, unlike *Marshall* v. *United States*, 360 U.S. 310 (1959), and the other cases cited by petitioners, the newspaper article in this case introduced nothing that the jurors did not already know or that they would not have learned during the trial.

The impact of assertedly prejudicial publicity must be assessed in light of the facts in each case, and the trial judge necessarily has broad discretion in determining whether prejudice has resulted, and, if so, what remedy is most appropriate. See, *e.g.*, *Marshall* v. *United States*, *supra*, 360 U.S. at 312; *United States* v. *Persico*, *supra*, 425 F.2d at 1382; see generally *Rosales-Lopez* v. *United States*, No. 79-6624 (Apr. 21, 1981), slip op. 5-6. The voir dire

in the instant case did not reveal any hostility against petitioners sufficient to suggest partiality that could not be set aside. See *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). To assert that the jurors, deliberating some six weeks after the article's appearance, even remembered the article, let alone relied on it in lieu of the trial evidence in convicting petitioners, is baseless speculation that does not even approach the requisite showing of prejudice necessary to support reversal of the district court's denial of the motions for mistrial and severance. Compare *United States* v. *Persico*, *supra*, 425 F.2d at 1380, 1382.[3] Juror assurances of impartiality should not be lightly dismissed, particularly when their exposure to the defendants' past crimes and associations comes from the defendants or their counsel. See *Murphy* v. *Florida*, *supra*, 421 U.S. at 800 n.3.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

AUGUST 1981

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[3] Although the Second Circuit saw no inconsistency between the decision in this case and *Persico* (see Pet. App. 5a-6a), to the extent that any such inconsistency exists, it should be resolved by the court of appeals rather than by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

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